Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Children's Television Obligations	)	MM Docket No. 00-167
of Digital Television Broadcasters	)	
	)	

PETITION FOR RECONSIDERATION

American Advertising Federation
American Association of Advertising Agencies
Association of National Advertisers, Inc.

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EXECUTIVE SUMMARY

The American Advertising Federation, the American Association of Advertising Agencies, and the Association of National Advertisers, Inc. (the "Advertising Associations"), respectfully submit the Commission must reconsider its decision to redefine "commercial matter" under the Children's Television Act ("CTA") to include promotions of programming other than educational and informational ("E/I") programs, and its application of the CTA's commercial limits to displays of website addresses in children's programs. Rules regulating children's programs must recognize the financial challenges in developing and producing quality children's shows, especially since programmers and advertisers face a hard cap under the CTA on the amount of commercial time they can rely upon with respect to children's programming. Concerns about what the FCC may view as increasing commercialization of children's programming must be balanced against the role of advertising in supporting quality children's programming. The objective of reducing "commercialization" cannot be pursued without due regard to whether any new rules and policies will advance that goal, whether they will have unintended consequences, and whether they violate the First Amendment.

Redefining "commercial matter" to remove the exemption for promotions of non-E/I programs will harm advertisers and providers of children's programs by creating an advertising time "squeeze." Requiring that promotions for upcoming non-E/I programs count as commercial matter will lead to reduced ad inventory. This will cause either lost ad sales in children's programs and/or diminished opportunities to promote programming. Less internal promotion of a channel's programming may result in smaller audiences, which in turn can depress ad rates, and lost ad revenues from decreased inventories and smaller audiences likely will diminish the quantity and quality of children's programming. Alternatively, or perhaps in conjunction with this, the cost of commercial time will increase, and this will raise costs that advertisers must

either pass on to consumers through higher prices or avoid by replacing advertising on television with advertising in other media that are less expensive and/or more cost-effective.

The redefinition of "commercial matter" also violates the Administrative Procedure Act ("APA") and raises constitutional issues. While the Commission stated its goal in making the rule change, it did not explain how the new rule comports with the rationale for the original exemptions from the definition, or what has changed with respect to that rationale to justify eliminating the exemption for promotion of non-E/I programming. Its explanation for how it expects the rule change to advance the goal of reducing program interruptions is practically nonexistent, and its justification for treating non-E/I program promotions differently from other exempt interruptions is arbitrary and discriminatory. Meanwhile, the FCC bears the burden of justifying the new restriction, but it offers no constitutional analysis to support its conclusions. In this regard, the rule faces more exacting review than ordinarily required for commercial speech regulations due to the discriminatory treatment of non-E/I promotions, and because efforts to increase the audience for speech products or services such as television shows receive the same protection as the speech itself. Even if the *Central Hudson* commercial speech test applied, the Commission could not meet its burden. It cannot show the new treatment it accords promotion of non-E/I programming directly and materially advances the stated interests, as the redefinition will not reduce the number or duration of program interruptions, and the arbitrarily revised exceptions to the "commercial matter" definition bring into question the rule's purpose.

The approach to the display of website addresses in children's programs is overbroad and counterproductive. The new rule is unclear, especially insofar as it offers no guidance on what amount or proportion of program-related content is "substantial," what constitutes a "primarily commercial" purpose, or how the "two-click" rule the rule contemplates will work. Virtually every website operated for or associated with any commercial venture likely has one or

more of the prohibited characteristics. Consequently, the rule does not fairly balance interests in exploring potential Internet-children's program interactivity with the mandate to protect children from overcommercialization. Just as the Commission refrained from regulating direct interactive links to websites in children's programming to foster creativity and innovation, so too should it be cautious in regulating existing interactivity, *i.e.*, the display of website addresses. Notably, the new rules foreclose in many ways one means for advertisers to reach viewers of children's programming (which include parents) that can serve as an alternative where opportunities to place ads in programs are limited or barred by the CTA "hard cap" on commercial matter.

The rules for displays of website addresses also raise APA, jurisdictional, and First Amendment concerns. They violate the APA because the FCC did not propose in its rulemaking notice to limit displays of non-interactive website addresses in children's programs, nor are the new rules a logical outgrowth of the notice. In this regard, the rule does not regulate children's programming so much as it regulates website content, and there are serious questions whether the Commission's authority under the CTA permits it to take such action. The Communications Act has no specific grant of authority authorizing the Commission to regulate either the Internet or the specific content in question. Here, too, the Commission did not offer any constitutional analysis of the rules despite its burden to justify them. Heightened scrutiny likely will apply since the rules are content-based, effectively dictate website content, and extend beyond speech that proposes a commercial transaction. Even assuming the less demanding *Central Hudson* test applies, the Commission does not set forth with the requisite specificity its interest for the website address requirements, nor can it show how the odd mix of criteria it adopted directly and materially advance the stated interests, or that less restrictive alternatives (including parental supervision and/or mechanisms available to parents to control the websites their children access) will not advance the government's objectives equally as well.

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PETITION FOR RECONSIDERATION

The American Advertising Federation ("AAF"), the American Association of Advertising Agencies ("AAAA") and the Association of National Advertisers, Inc. ("ANA") (together, the "Advertising Associations"), hereby seek reconsideration of portions of the Report and Order in the captioned proceeding. [1] Though the Advertising Associations appreciate and concur with the Commission's decisions to refrain from regulating the appearance in children's programming of allegedly "inappropriate promotions," and of direct, interactive links to Internet websites, *id*. ¶¶ 53-54, 61-64, they respectfully submit that the Commission erred in (i) revising the definition of "commercial matter" for purposes of the children's programming rules to include promotions of programs or programming services other than children's educational and informational ("E/I") programming, *id*. ¶ 57-59, and (ii) how it applied the Children's Television Act [2] to displays of website addresses during children's programs. R&O ¶¶ 50-52. Accordingly, the Advertising Associations ask that the Commission reconsider those portions of the Report and Order and adopt rules more consistent with longstanding FCC rules interpreting the CTA, reasonable commercial practices that support children's programming, and the First Amendment.

[1] *Children's Television Obligations of Digital Television Broadcasters*, 19 FCC Rcd. 22943 (2004) ("Report and Order" or "R&O"), *recon. granted in part*, FCC 05-22 (rel. Jan. 31, 2005).

[2] 47 U.S.C. §§ 303a, 303b, 394 ("CTA").

I. INTRODUCTION

Advertising issues germane to children's programming and to other programming and media affected by FCC rules regulating children's television are of vital import to the Advertising Associations. AAF represents over 50,000 professionals in the advertising industry employed by its 130 corporate members that include advertisers, agencies, and media companies comprising the nation's leading brands and corporations. AAAA is the national trade association for advertising agencies with members representing nearly all the large, multi-national agencies, as well as hundreds of small and mid-sized agencies located in 13,000 offices throughout the country, which represent approximately 75 percent of national, regional and local U.S. advertising placed by agencies. ANA is the advertising industry's oldest trade association, representing companies offering more than 8,000 brands of goods and services, and is the only organization dedicated to entities that advertise on a national and regional basis. Its members, consisting of manufacturers, retailers and service providers nationwide reflecting a cross-section of American industry, carry out more than $100 billion worth of advertising each year in the U.S. alone. The Advertising Associations participated from the outset of this proceeding to advocate the adoption of rules and policies that reflect feasible and child-friendly advertising practices, while maintaining reasonable commercial opportunities and the sustained viability of children's programming. [3]

It is important, as the Advertising Associations noted, that any rules the FCC adopts for children's programming recognize "the financial challenges in developing and producing quality children's programming." ANA/AAAA Comments at 1. Providers of children's television programs, and advertisers who wish to reach viewers of them, already face a hard cap on the "commercial matter," *i.e.*, advertising time, that is available under the CTA and FCC rules, and

[3] *See* ANA/AAAA Comments, filed Dec. 18, 2000, in MM Docket 00-167; AAF Comments, filed Jan. 17, 2001, in MM Docket 00-167.

other restrictions as well. [4] Given the pressures that already existed even before adoption of any new rules, advertisers cautioned against redefining "commercial matter" in ways that will force broadcasters to provide children's programming while deriving fewer revenues from it. AAF Comments at 2. They also opposed rules that "serve to limit broadcasters' options as they make their way" in a new environment that includes DTV as well as opportunities within, and competition from, other emerging new media. *Id*. at 5. The Advertising Associations thus argued, and the Commission in many respects agreed, that the rules should promote innovation in attracting revenue streams to support quality programming, while presenting viable commercial opportunities that do not detract from the programming's educational, informational and other benefits. [5]

In adopting the Report and Order, the Commission appropriately avoided, as the Advertising Associations suggested, the serious legal and policy issues that would have been created had it sought to restrict, require ratings for, or otherwise regulate promotions in children's shows for programs that "may be unsuitable for children to watch," and it properly declined to regulate at this nascent stage direct, interactive links between children's DTV programs and the Internet. R&O ¶¶ 53-54, 61-64. The Commission did so, in significant part, because it recognized the role of the market and the value of creativity and innovation in producing, supporting and marketing children's and other television programming. *See supra* note 5. However, as shown below, the Commission's regulation of displays of Internet website addresses in children's programming creates many of the same problems avoided by forbearing from

[4] *See* 47 U.S.C. § 303a(b) (restricting duration of advertising in children's programming on broadcast and cable television to 10.5 minutes/hour weekends and 12 minutes/hour weekdays); 47 C.F.R. §§ 73.670, 76.225(a) (same). *See also* R&O ¶¶ 5, 8 n.25 & 14.

[5] *See, e.g.*, R&O ¶¶ 46, 50-51, 54, 63 (leveraging evolution of unobtrusive on-screen identifiers in programming, allowing unlimited displays of program-related (and other) website addresses under some circumstances, encouraging experimentation with DTV-Internet interactivity, and encouraging improvements in V-Chip utility). *See also* AAAA/ANA Comments at 2-4; AAF Comments at 3-4.

regulating direct, interactive links, and its redefinition of "commercial matter" is at odds with other instances in which the Commission refrained from regulating non-program material that appears within children's programming.

The Advertising Associations submit that the Commission's concerns about what it views as "trends of increasing commercialization of children's programming" must be balanced with recognition of the role of advertising in supporting the production of quality children's programming. *See* R&O (Statement of Chairman Michael K. Powell). Moreover, the goal of simply "reduc[ing] the number of commercial interruptions" in children's programming, *id.* ¶ 57, cannot be pursued without regard to whether new rules and policies will advance that goal, whether they will have unintended adverse consequences, and whether they comport with the First Amendment. Taking these issues into proper consideration, the Commission should reconsider (i) its decision to redefine "commercial matter" in children's programming to include same-channel promotions for programs that do not meet the FCC's definition of E/I programming, and (ii) its treatment of the display of Internet website addresses in conjunction with children's programming.

II. THE COMMISSION SHOULD RECONSIDER ITS REVISIONS TO THE DEFINITION OF "COMMERCIAL MATTER"

Redefining "commercial matter" to remove the exemption for cross-promotions of non-E/I programs or programming services offered on a broadcast or cable channel will harm advertisers and children's programming and is unsound as a matter of law and policy.[6] As a

[6] R&O ¶ 57-59. The Commission's rules already treated as commercial matter promotions during children's programming on one channel of a program or programming service on another channel (without regard to whether the promotion is for an E/I program). *See*, *e.g.*, *SuperStation, Inc.*, 8 FCC Rcd. 490 (1993). We note, as the Commission observed, that for purposes of CTA limits on children's programming commercial limits, the term "commercial television broadcast licensee" includes cable operators. R&O ¶ 1 n.2 (citing 47 U.S.C. § 303a(d)). We similarly use the term "broadcasters" herein to include over-the-air broadcasters and cable providers, unless it is stated otherwise or the context indicates a more specific reference.

practical matter, the rule change will create an advertising time "squeeze" detrimental to both advertisers and broadcasters, as the Advertising Associations already have shown. AAAA/ANA at 5 (changes in definition of "commercial matter" will "further squeeze the amount of time available for commercial messages from program sponsors"). Forcing broadcasters to count promotions for upcoming shows toward the commercial matter maximums that apply to children's programming means that for every such promotion, broadcasters must reduce their inventory of advertising time by a like amount to maintain compliance with the CTA and FCC rules. Consequently, broadcasters face either lost advertising sales in children's programs, diminished opportunities to promote their programming, or – as is more likely – both.

Because broadcasters cannot afford (both literally and figuratively) to simply stop promoting their non-E/I shows during children's programming, they will be required to sell less advertising. This in turn will reduce revenues earned by children's programming (since self-promotion does not directly generate revenue) and likely will diminish the quantity and quality of children's programs that broadcasters can offer. [7] The only way this impact might be avoided would be raising rates for advertising in children's programming to replace lost revenues. This increases costs for advertisers, which in turn are passed on to consumers through higher prices, or it drives advertisers from broadcasting to other media that are less expensive and/or more cost-effective. [8] In addition, ads squeezed out of children's programs may be moved elsewhere

[7] This drawback is particularly pointed with respect to children's programming on cable, as cable operators, unlike over-the-air broadcasters, are under no affirmative obligation to carry *any* children's programming. *See* 47 U.S.C. § 303b; 47 C.F.R. § 73.671. In this regard, rule changes that make advertiser-supported children's programs less self-sustaining may well cause a reductions in children's programming on the basic or expanded basic tiers, or a migration to premium services that, while free of ads, are available only to those who can afford to pay extra for them.

[8] Even this, however does nothing to compensate for lost inventories of ad time, so even at a higher price fewer advertisers will be able to reach viewers of children's programming, which, though directed primarily at children 12 and under, often have a substantial adult audience.

on the broadcaster's schedule, thereby increasing clutter during those programs and, in some regards, diminishing somewhat the value of the advertising therein. Even if broadcasters could afford to no longer promote their non-E/I shows during children's programming, doing so may result in diminished audiences for those programs. This not only is undesirable in of itself from a broadcaster's perspective, but for advertisers, reduced audiences mean either that they get less for their money buying commercial time in those programs, or that ad prices for those shows must drop. Consequently, revenue needed to produce the program is lost. Reconsidering the redefinition of "commercial matter" to include same-channel promotions of non-E/I programs during children's programming is necessary to avoid these consequences.

A. APA Issues

Reconsideration also is necessary in that the rule change violates the Administrative Procedure Act ("APA"), which requires "an agency to accompany a change in position with an explanation." *Harrington v. Chao*, 280 F.3d 50, 58 (1st Cir. 2002). To be sure, the Commission explained its *objective* in revising the definition of "commercial matter," [9] but it offered no *rationale* for the rule change. *See Communications and Control, Inc. v. FCC*, 374 F.3d 1329 (D.C. Cir. 2004) ("simple *ipse dixit*" explanation for FCC "changing its course" held arbitrary and capricious). When the FCC first implemented the CTA, it defined "commercial matter" as "air time sold for purposes of selling a product" or service, with "'sold' … mean[ing] the advertiser must give some valuable consideration either directly or indirectly to the broadcaster … as an inducement for airing the material." *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd. 2111, 2112 (1991) ("*Children's TV Order*"). It exempted from this definition, among other things, public service announcements ("PSAs") sponsored by nonprofit

[9] *See* R&O ¶ 57 ("Our goals in making this revision to the definition of commercial matter are to reduce the number of commercial interruptions in children's programming and encourage the promotion of educational and informational programming for children.").

entities to promote not-for-profit endeavors, airtime sold to present educational and informational material, including announcements with a bare "sponsored by" mention, and promotions of upcoming shows – regardless if they qualify as E/I programming – so long as they did not contain sponsor-related mentions. *Id*. The clear rationale for the exemptions was that the Commission believed these program interruptions do not comprise "sold" airtime, that they do not promote a product or service, and/or that they are not induced by consideration. [10]

The Commission states it now believes "program promotions should fall within the scope of commercial matter because the station broadcasting the promotion receives significant consideration for airing these advertisements: specifically, the increased audiences for the promoted program which presumably leads to increased advertising rates." R&O ¶ 58. However, the Report and Order does not explain at all why, if such promotions did not satisfy the definition of "commercial matter" as it was originally adopted, they have now come to satisfy the definition. The text of the definition has not changed. [11] Nor has the Commission given any indication that the nature of broadcaster promotions of upcoming programs on their own stations has changed, or that their value to broadcasters has changed. Accordingly, there appears to be no basis for the rule to change other than that the Commission wishes it so in order to advance its

[10] *See id*. With respect to same-channel program promotions, the most obvious conclusion is that the Commission did not consider a broadcaster to be an "advertiser" that could provide consideration with respect to its own station, and/or that potentially increased audiences gained though the promotion were not "consideration" within the meaning of the definition. *See id*.

[11] *See id*. ¶ 8 (quoting *Children's TV Order*, 6 FCC Rcd. at 2112). It is notable, though, that the rule change creates special definitional problems for providers of children's programming on cable. Whereas over-the-air broadcasters must provide a minimum amount of E/I programming and report to the FCC which shows satisfy that requirement, cable operators have no such obligation. *See supra* note 7. Consequently, it will never be entirely clear for cable operators which promotions for children's programming that they air within children's programs qualify as "commercial matter" and which need not count toward the commercial matter limit. Such definitional confusion and the related regulatory burdens it adds for cable providers create unnecessary disincentives for them to offer children's programming, which they are under no obligation to provide if it becomes commercially infeasible or otherwise unduly burdensome to do so. *See id*.

goals of reducing commercial interruptions and encouraging promotion of E/I programs. This violates longstanding mandates that "an agency must supply a persuasively reasoned explanation for modifying its earlier position that is itself *rationally grounded in the evidence* before the agency," *Reservation Tel. Coop. v. FCC*, 826 F.2d 1129, 1135 n. 4 (D.C. Cir. 1987) (emphasis added; citations omitted), and that "[i]t is … incumbent upon an agency reversing its own policy to" show that it is "'faithful and not indifferent to the rule of law.'" *Chisholm v. FCC*, 538 F.2d 349, 364 (D.C. Cir. 1976) (quoting *CBS v. FCC*, 454 F.2d 1018, 1026 (1971)). *See also National Black Media Coalition v. FCC*, 775 F.2d 342, 355-56 & n.17 (D.C. Cir. 1985)) (if agency pursues a "purposeful change of course, [it] must provide sufficient explanation to ensure … its new train of thought is not arbitrary, and is not the product of impermissible considerations" such as "repudiat[ing] precedent … to conform with a shifting political mood") (footnotes omitted).

The redefinition of non-E/I same-channel promotions is so malleable that the Commission's decision to draw the line where it has is wholly arbitrary and capricious. If there is, as the Commission maintains, "significant consideration for airing [promotions] for upcoming shows," R&O ¶ 58, that is just as true of promotions for E/I programming, as is the extent to which they interrupt program material. Yet the Commission continued to exempt such promotions from the definition of "commercial matter." Airing PSAs and other permissible sponsored non-program material also offers benefits, but the Commission chose to maintain the exemption for them, too. The point here is not that all these program interruptions also should no longer be exempt and should fall within the definition of "commercial matter," but rather that there is no principled basis for not continuing to treat non-E/I promotions as exempt as well.

Moreover, even if simply stating the objective of an about-face in how an agency's rules are to apply were sufficient to support such a change in course, it is far from assured that reducing the number of program promotions will advance the Commission's goals of reducing

commercial interruptions or increasing the amount of program material in children's shows. R&O ¶¶ 57-58. Nothing in the Report and Order provides a reason to assume the number of commercial breaks will decrease as a result of the rule change. At best it may alter the content of the interruptions and perhaps their duration (though that is unlikely for reasons that follow). Nor is the rule change likely to address concerns that "the amount of time devoted to actual program material … is [] less than the limitation on … commercial matter alone might suggest." *Id*. ¶ 55. In addition to the duration of commercial breaks, the amount of program material in a TV show is affected by other factors. These include budget constraints (which will be tightened for children's programming under the rule change as ad revenues decrease for reasons explained above), and the need for and value of other non-program materials that are not "commercial matter," such as PSAs and E/I materials (including those that are sponsored). The more likely result of the rule change thus will be shifts in the composition of non-program material – not a decrease in it – because broadcasters can use time presently dedicated to promoting their own programming not for more program matter, but for other non-program uses. The Commission's failure to show how the rule change will achieve its stated goals renders its revision of the "commercial matter" definition arbitrary and capricious action under the APA. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (agency "must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based").

B. First Amendment Issues

The rule change also raises serious constitutional issues, in several regards. First, as with any speech regulation, the Commission bears the burden of justifying the new restriction, and must build a record "adequate to clearly articulate and justify" it.[12] Yet the Report and

[12] *U. S. West, Inc. v. FCC*, 182 F.3d 1224, 1234 (10th Cir. 2001). *See also Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) .

Order offers no analysis whatsoever that shows how treating same-channel non-E/I promotions as commercial matter satisfies First Amendment requirements. This alone is a fatal flaw. *See Western States Med. Ctr.*, 535 U.S. at 379 ("the Government's failure to justify its decision to regulate of speech" was "enough" to render the regulations unconstitutional).

Second, whatever constitutional justification the Commission offers for the rule likely will face "more exacting review" than that ordinarily required for commercial speech regulations.[13] While the Commission may claim that non-E/I promotions for upcoming shows are commercial speech, and that regulation of them consequently faces only the *Central Hudson* test, a stricter test nevertheless may apply. Applying different rules to promotions for upcoming E/I programs (and other exempt categories that promote goods or services, such as sponsored PSAs) and those for upcoming non-E/I programs rests on a content-based distinction. Thus, though the rule may distinguish among categories of commercial speech, it does so despite the fact that the categories pose the same alleged harms, as do other categories of non-commercial speech, and the rule accordingly may be subject to closer scrutiny.[14] In addition, promotions to increase the "circulation" for the publication of non-commercial speech products or services (*i.e.*, increasing the audience for TV shows, which are entitled to "full" constitutional protection[15]) are entitled to

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[13] *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 n. 11 (1993) (discussing, *inter alia*, *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that commercial speech regulation must serve substantial governmental interest, which it directly and materially advances, and must be no more extensive than necessary to serve the stated interest)).

[14] *See Discovery Network*, 507 U.S. at 424, 428 & n.11 (invalidating regulation premised on distinction between commercial and noncommercial speech); *Rappa v. New Castle County*, 18 F.3d 1043, 1074 n.54 (3d Cir. 1994); *Pearson v. Edgar*, 153 F.3d 397, 405 (7th Cir. 1998).

[15] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 632 (1994). *Cf., Discovery Network*, 507 U.S. at 420 (motion pictures do not lose First Amendment protection just because they are "sold" for profit) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)).

the same level of protection as the product or service itself. [16] Here, the fact that both the speech product or service and promotion of it receive the same level of constitutional protection means the same scrutiny that applies to content-based regulation of television program material, *see Turner Broad.*, 521 U.S. at 638, would apply to regulation of efforts to promote it.

Moreover, even if *Central Hudson* applied, and even if it is assumed the CTA and FCC rules on children's programming generally target a government interest that is substantial (or compelling, were strict scrutiny to apply), the Commission still could not satisfy its burden. It cannot demonstrate that the new treatment it accords same-channel promotions of upcoming non-E/I programming materially advances the stated interests. As noted, nothing in the Report and Order suggests that assumptions regarding the effect of the rule change on the number or duration of interruptions in children's programming actually will occur. *See supra* at 9. Such inability to show the effectiveness of the rule change, and/or to cite record evidence proving the effectiveness, precludes the Commission from showing material advancement of its interest and renders the rule change incapable of withstanding constitutional scrutiny. It is notable in this regard that numerous courts have held that "exemptions and inconsistencies bring into question [a law's] purpose" and preclude it from directly and materially achieving its objectives. *Rubin* 514 U.S. at 489. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 189 (1999); *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1071-74 (10th Cir. 2001) ("*ULBA*"). The continued treatment of same-channel promotions for E/I programming as exempt, and the other categories of exemptions from the commercial matter definition, all con-

[16] *See, e.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (expressly rejecting government's claim that ordinance regulating sale of protected speech products could be "saved because it relates to distribution and not to publication"). *See also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196-97 (11th Cir. 1991); *Gasparo v. City of New York*, 16 F.Supp.2d 198 (E.D.N.Y. 1998); *Rubin v. City of Berwyn*, 553 F. Supp. 476 (N.D. Ill.); *Lewis v. Columbia Pictures Ind., Inc.*, 23 Media L. Rep. 1052 (Cal. Ct. App. 1994).

tribute to the ills the Commission cites for its new approach to the promotion of upcoming non-E/I programs. Consequently, removing such promotions from the exemptions to the definition of "commercial matter" cannot materially advance the government interest here. [17]

C. Clarifications Required in the Absence of Reconsideration

Even if the Commission declines to reconsider its reclassification of same-channel promotions of upcoming non-E/I programming as commercial matter, it should clarify the application of the new rules. [18] The Commission should specify that if such promotions appear in a program for later broadcasts or episodes of the same program, the promotion does not constitute a "program-length commercial" ("PLC") that requires the entire program to count as commercial matter. While such a result could arise from an overly technical reading of the rules, [19] that

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[17] In *Rubin*, the Supreme Court held that "exemptions and inconsistencies [brought] into question the purpose" of federal regulations that barred the disclosure of alcohol content on beer labels but required it for certain wines, and rendered the rules unconstitutional. 514 U.S. at 489. *See also ULBA*, 256 F.3d at 1074 (state statute constituting discriminatory ban on some liquor ads invalidated where it attempted to "distinguish among the indistinct, permitting a variety of speech … that poses the same risks the Government purports to fear") (quoting *Greater New Orleans Broad.*, 527 U.S. at 195). Here, the Commission seeks to differentiate between same-channel promotions for E/I programming and same-channel promotions for other programs. Much like the differential treatment of alcohol labels and ads in *Rubin* and *ULBA*, none of these types of promotions contributes to a greater or lesser extent to the purported ill to which the Commission points – the number of commercial interruptions in children's programming. Of course, this failing and the other constitutional issues raised here only scratch the surface of the First Amendment deficiencies of the change in the definition of "commercial matter," and more detailed analysis certainly is required. However, it is incumbent upon the FCC to provide that analysis in the first instance, *see supra* at 9-10, and until it does so, attempting to identify shortcomings in its First Amendment showing would be mere speculation. The Advertising Associations thus reserve the right to submit more detailed analysis of whatever constitutional justification the Commission offers (if any) on reconsideration of the Report and Order.

[18] The requests for clarification herein are not intended to suggest that the APA, constitutional and jurisdictional problems described herein can be remedied by granting clarification, but rather signify that changes are necessary notwithstanding the legal deficiencies that will remain if the Commission does not reconsider the new rules.

[19] The "long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time," R&O ¶ 8 n.25, arguably could extend to a promotion for an upcoming airing or episode of

approach would deny broadcasters the ability to promote their programs to an audience that has already demonstrated an interest in the show by tuning in to it. At the same time, it would serve no purpose beyond that accomplished (if any) by treating the promotion as commercial matter. The Commission also should clarify that if a promotion of an upcoming program is limited only to scheduling information, *i.e.*, the time and day or date it airs, and provides no descriptive or other qualitative message or call to action, the promotion does not count as commercial matter regardless of whether the show promoted is E/I programming. In such cases, the extent to which the "air time [is used] for purposes of selling a product" or service is so minimal it cannot be said to satisfy the definition of "commercial matter." *See supra* at 6 (citing 6 FCC Rcd. at 2112).

III. THE COMMISSION SHOULD RECONSIDER ITS REGULATION OF INTERNET WEBSITE ADDRESSES IN CHILDREN'S PROGRAMMING

The Commission's approach to the display of Internet website addresses in children's programming is overbroad and counterproductive, and raises APA, jurisdictional, and First Amendment concerns. The Commission refrained from regulating direct, interactive links in children's programs because "[t]here is little if any use of direct Internet connectivity today" and, accordingly, regulating "such links … at this stage … is premature." R&O ¶ 53. However, indirect interactivity between television and the Internet, through the appearance of website addresses in television programming, does exist and the opportunities it presents still are at a relatively nascent stage. Thus, for the same reasons the Commission declined to interfere with development of DTV-Internet interactivity through direct, interactive links, it should reconsider its approach to the display of website addresses. [20]

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a program if it airs during that program. *See Sainte Ltd.*, 13 FCC Rcd. 16131 (1998) (promotion of videotapes of "Quigley's Village" during "Quigley's Village" program created PLC in violation of children's programming commercial limits).

[20] The Report and Order suggests that the new requirements and prohibitions on commercial websites in children's programming apply only to visual appearances, and not audio references,

In the Report & Order, the Commission interpreted the CTA commercial time limits to require that, with respect to children's programming, the display of Internet website addresses during program material is permitted within CTA limitations only for websites that:

> (1) offer a substantial amount of *bona fide* program-related or other noncommercial content; (2) are not primarily intended for commercial purposes, including e-commerce or advertising; (3) feature a home page and other menu pages that are clearly labeled to distinguish the noncommercial and commercial sections; and (4) are not used at all for e-commerce, advertising or other commercial purposes (*e.g.*, no links labeled "store" or to other webpages with commercial material) at the Internet page to which the website address directs viewers.

R&O ¶ 50. The Commission did not elaborate regarding how much or what proportion of program-related content is "substantial," what constitutes a "primarily commercial" purpose, or how the "two-click" rule contemplated by the latter criterion is intended to work in practice. [21]

The new requirements are largely unclear as set forth in the Report and Order, and are grossly overbroad. Virtually every website operated for or in association with any commercial venture likely has one or more of the prohibited characteristics. In this regard, the new rules do not "fairly balance[] the interest … in exploring the potential uses of the Internet in connection with children's programming with [the] mandate to protect children from over commercialization." R&O ¶ 52. Rather, the strict new rules will thwart not only creativity and innovation regarding the manner in which providers of children's programming utilize their web presence to

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to such URLs. If this is accurate, the Commission should confirm as much. In doing so, however, it should recognize there is no reason to treat visual displays differently. If the concern is overcommercialization by encouraging children to log onto the Internet and visit commercial websites, audio mentions would have the same effect, yet the Commission did not regulate them. On reconsideration, the Commission should recognize that both visual and aural references to website addresses do not interfere with program material, and that the same extra step of logging onto the Internet is required, and that consequently neither should be restricted.

[21] There is effectively a "two-click" requirement to get to commercial material, because the page of a website to which viewers are directed by a televised website address cannot be used for e-commerce, advertising, or to offer links to an online "store."

reinforce the programs, they eliminate a potential revenue stream that can support the programs as well. Significantly, the new rules also foreclose in many ways a means for advertisers to reach viewers of children's programming (which as noted often include parents who watch with their children) that can serve as an alternative where opportunities to place ads in programs are limited or barred by the CTA "hard cap" on commercial matter. [22]

It is not sound policy for the FCC to discourage companies from tapping the potential of this alternative channel as a means for advertisers to reach consumers and for broadcasters to obtain revenue necessary to provide children's programming. To whatever extent advertisers currently pursue opportunities presented by websites associated with children's programming, or with the product(s) or service(s) provided by companies that buy advertising time in children's programs, it is likely that, left free from intrusive regulation, such opportunities will flourish through market forces to the benefit of both advertisers and broadcasters (and, by extension, viewers). Conversely, advertisers and broadcasters will avoid further developing such websites if FCC rules make doing so unduly burdensome or commercially infeasible. Thus, while the Commission was correct in finding it would be premature, speculative and potentially self-defeating to "place unnecessary barriers in the way of technical developments" with respect to direct, interactive links to commercial Internet sites," R&O ¶ 53, it takes exactly that kind of self-defeating approach to displays of website addresses even as it "encourages" broadcasters "to experiment with the capabilities" that television-Internet interactivity can offer. *Id*. ¶ 54.

[22] This is especially problematic in that displays of website addresses often appear in "crawls" or "bugs" in the programming that do not supplant program material, and thus do not present the problems of too many commercial interruptions or diminished program lengths that the Commission has cited as the kind of "overcommercialization" from which it seeks to protect children. *See* R&O ¶¶ 57-58.

A. APA, Jurisdictional and Constitutional Issues

As with the redefinition of "commercial matter," the Commission's framework for regulating the display of Internet website addresses in children's programming raise significant issues of law that necessitate reconsideration of the new rules. As a threshold matter, the Commission did not propose in its rulemaking notice in this proceeding (or elsewhere) any rule that contemplated limiting displays of non-interactive website addresses in children's programs.[23] Accordingly, adoption of such a rule, which is not a "logical outgrowth" of any aspect of the NPRM, violates APA notice-and-comment requirements. *See Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003); *National Black Media Coalition v. FCC*, 791 F.2d 1016 (2d Cir. 1986).

There also are serious questions about whether the Commission's statutory authority permits it to impose the wholesale website-design requirements adopted in the Report and Order. The CTA authorizes the Commission only to adopt regulations implementing specific limits on the amount of commercial matter that appears during televised children's programming – it does not extend as far as regulating other media such as the Internet. Courts have held that where the Commission seeks to regulate program content, it may do so only pursuant to a specific grant of authority. *See MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002). In *MPAA*, the D.C. Circuit vacated the Commission's video description rules for want of statutory authority, because the rules directly regulated the content of television programming and the Commission could cite no more than general public interest and necessary-and-proper statutory provisions to support its actions. *Id*. at 801-06. Here, the Commission's authority is even further attenuated in that it

[23] *See Children's Television Obligations of Digital Television Broadcasters*, 15 FCC Rcd. 22946, 22958-59 (2000) (discussing limiting display of Internet websites in children's programs only in context of direct, interactive links, and only with respect to DTV offerings) ("NPRM").

seeks to regulate a medium as to which it holds no statutory authority to regulate content – *i.e.*, the Internet – and it accordingly has significantly exceeded its jurisdiction. [24]

As with the redefinition of "commercial matter," the new rules for displays of website addresses in children's programming also pose a number of constitutional problems. The rules clearly regulate speech – with respect both to children's programming and to the content of Internet websites – yet the Commission made no effort to satisfy its burden of showing how the rules comport with the First Amendment. [25] Here, too, the Commission likely faces stricter scrutiny, as its rules restricting which websites may be referenced in children's programming are content-based in that they effectively dictate website content, [26] and the requirements reach not only "speech proposing a commercial transaction," *Rubin*, 514 U.S. at 482 (quoting *Central Hudson*, 447 U.S. at 562), but website structure and operation as well. The same holds true to the extent the rules govern displays of bare website addresses, which are by no means inherently "commercial" and in many cases likely relate to websites that have both noncommercial and commercial elements. *See* R&O ¶ 53 n.98 (citing favorably discussion of "mixed-use Internet sites" in Sesame Workshop Comments (Dec. 2000) at 23-25).

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[24] This is particularly true to the extent the new rules purport to reach websites operated by cable networks in conjunction with programming they offer cable operators. The authority conferred by the CTA extends only to cable operators, not cable networks. *See supra* notes 6-7. The rules govern cable network practices only by extension through the Commission's authority over cable operators under the CTA. Efforts to regulate the content of a cable network's website, which plays little or no role in the its relationship with operators, is even further attenuated.

[25] *See supra* at 9-10 (Commission has burden to show constitutionality of its rules affecting speech, and failure to satisfy that burden is fatal) (citing *U. S. West*, 182 F.3d at 1234; *Western States Med. Ctr.*, 535 U.S. at 373; *Rubin*, 514 U.S. at 490).

[26] *See, e.g., ACLU v. Johnson*, 194 F.3d 1149, 1156 (10th Cir. 1999) ("content-based regulation of Internet speech is subject to … strict scrutiny") (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997). *See also id*. at 1156 n.4 ("After examining the nature of the Internet, and concluding that it is more similar to the telephone … than to the broadcast media, the Court in *Reno* determined that the Internet deserved the highest level of First Amendment protection").

The new multifaceted test for determining whether the display of an Internet website address is permitted during children's programming also is constitutionally suspect on vagueness grounds. *See, e.g.*, *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) ("vagueness applies with particular force [to] laws dealing with speech"). Without clear guidelines, broadcasters can not understand what is forbidden and what is not. *Reno*, 521 U.S. at 874. Such vague standards impermissibly chill speech, causing broadcasters to "steer far wide[] of the unlawful zone," *Speiser v. Randall*, 357 U.S. 531, 526 (1958), and to restrict their expression "to that which is unquestionably safe." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). In this regard, the display of a website address in children's programming is prohibited outright unless the website offers a "substantial amount" of "*bona fide*" content that is "program-related" or otherwise "noncommercial," and is not intended "primarily" for a "commercial purpose." R&O ¶ 50. Yet the Report and Order provides no guidance whatsoever regarding what *any* of these critical terms mean. Considering the new rules erect a wholesale ban on even mentioning these websites unless it satisfies these criteria, the Commission should not hold broadcasters, advertisers, and website operators to a standard as to which they can only "guess at its contours." *Gentile v. State Bar*, 501 U.S. 1030, 1048 (1991).

Finally, even assuming (again) that the less demanding *Central Hudson* test applies to the new rules on website address displays in children's programming, the Commission will face significant difficulty meeting its burden. [27] First, the Commission has come nowhere near setting forth with the requisite degree of specificity the government's interest for the website address requirements. Here, the Commission must show not just that it has a generalized interest in

[27] If the Commission cannot satisfy its burden of justifying the rules as a commercial speech restriction, it certainly will not be able to do so under strict scrutiny. *See Discovery Network*, 507 U.S. at 416 n. 11; *Anderson v. Treadwell*, 294 F.3d 453 (2d Cir. 2002) (citing "somewhat less rigorous standards of *Central Hudson*" as compared to strict scrutiny) (citing *Western States Med. Ctr.*, 535 U.S. 357; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001)).

protecting children from overcommercialization, but rather how that interest is implicated by the display of website addresses that require viewers to leave the broadcast service the FCC is empowered to regulate (TV) and log onto an entirely different medium (the Internet) before any exposure to commercial matter occurs. [28]

In addition, the Commission must show how the criteria it adopted for determining the websites to which it believes it is acceptable to direct viewers of children's programming directly and materially advance the Commission's interests. Notably, such websites may be used for commercial purposes such as e-commerce and advertising so long as it is not their "primary" purpose, their homepages may have commercial sections so long as they are clearly segregated, and they may offer links (though not clearly labeled ones) to webpages that contain commercial matter and/or provide opportunities to purchase goods or services. R&O ¶ 50. The Commission must explain how this particular amalgam of criteria will advance, and does not undermine, its asserted interests. [29] The Commission also must show these requirements are narrowly tailored, and that other alternatives – including parental supervision and/or mechanisms available to

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[28] *See, e.g., U.S. West*, 182 F.3d at 1234-35 ("the government cannot … merely assert[] a broad interest" but rather "must specify the particular notion of [the] interest served" in a manner that is "specifically articulate[d] and properly justifie[d]," then must "show [how the activity regulated] would inflict specific and significant harm" to the interest asserted). The Commission may not simply fall back on an assumption that the CTA is constitutional and justify the regulations adopted thereunder on that basis. *Compare Time Warner Entmt. Co., L.P. v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000) (rejecting facial constitutional challenge to Cable Act ownership provisions), *with Time Warner Entmt. Co., L.P. v. FCC*, 240 F.2d 1126 (D.C. Cir. 2001) (invalidating as unconstitutional FCC horizontal and vertical cable ownership rules adopted to implement Cable Act).

[29] *See U.S. West*, 182 F.3d at 1237 ("While protecting against disclosure of … personal information may be important in the abstract, we have no indication of how it may occur in reality with respect to CPNI. Indeed, we do not even have indication that the disclosure might actually occur [as the] government presents no evidence regarding [this point]. * * * * Similarly, the FCC can theorize that allowing existing carriers to market new services with CPNI will impede competition … but it provides no analysis of how or if this might actually occur [b]eyond its own speculation … [and] conjecture, [which] is inadequate to justify restrictions under the First Amendment."). *See also Rubin, Greater New Orleans Broad., ULBA, supra*.

parents to control the websites their children access – will not advance the government's objectives equally as well. [30]

B. Clarifications Required in the Absence of Reconsideration

Even if the Commission declines to reconsider its prohibition on the display of certain Internet website addresses in children's programs or its criteria for which addresses may be displayed, it should at least clarify how the new rules apply. The most glaring need for clarification, of course, lies in the need for meaningful guidelines for each of the criteria in the test for acceptable websites, including (i) explaining what it means for website content to be "program-related" and what it takes for such content or other "noncommercial" material to be "*bona fide*," (ii) indicating what quantum or proportion of it is a "substantial amount," and (iii) specifying when a website's purpose is "primarily" commercial. R&O ¶ 50. The Commission also must explain how its "two-click" rule is reasonably expected to operate. *See supra* note 21.

In addition, the Commission should revise the new rules to specify that programs that displayed website addresses when airing prior to the effective date of the new rules do not have to be "scrubbed" of the addresses if the show re-airs after the rule takes effect. There is no basis for requiring broadcasters, cable operators, cable networks, and other program providers to incur the substantial costs to review any and all such "pre-rule" programming they wish to re-air and to edit it to remove noncompliant website addresses. Furthermore, the Commission should, as

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[30] *Western States Med. Ctr.*, 535 U.S. at 371 ("if the Government can achieve its interests in a manner that does not restrict commercial speech, or that restricts less speech, the Government must do so"); *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995) (if "obvious less-burdensome alternatives" would serve its interest as effectively, the government must use them). *Cf. Ashcroft v. ACLU*, 124 S.Ct. 2783, 2791-92 (2004); *United States v. Playboy Entmt. Group, Inc.*, 529 U.S. 803, 815 (2000) ("if a less restrictive means is available for the Government to achieve its goals, the Government must use it"). We note that here, as with changes in the definition of "commercial matter," the above discussion only begins to examine the constitutional issues presented by the new website address display rules, and only at a generalized level, given that here, too, it is incumbent upon the Commission, in the first instance, to provide a constitutional justification for the rules.

noted above, specify that in regulating the appearance of website addresses during children's programming, the intent was to restrict only visual displays and not aural mentions of them. *See supra* note 20.

IV. CONCLUSION

For the foregoing reasons, the Advertising Associations respectfully request that the Commission reconsider and/or clarify its Report and Order in this matter insofar as it redefined "commercial matter" for purposes of children's programming to include promotions for non-E/I programming, and to the extent it adopted rules governing visual displays of website addresses during program material in children's programming.

Respectfully submitted,

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